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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN HENDRIX,

Defendant and Appellant.

C085525

(Super. Ct. No. CRF161094)

Defendant drove an SUV containing four children well above the speed limit; he collided with a car, killing Cynthia Jonasen (the driver of the car and its sole occupant) and injuring all his own passengers. The People's case at trial included the testimony of numerous eyewitnesses, as well as expert testimony on defendant's intoxication and also on accident reconstruction.

The jury found defendant guilty of gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a));¹ count 2), driving under the influence of drugs (DUI) causing injury (Veh. Code, § 23153, subd. (e)) with an enhancement for causing bodily injury to more than one person (Veh. Code, § 23558; count 3), and four counts of child endangerment (§ 273a, subd. (a); counts 4-7). The jury hung on an implied malice murder charge (count 1) and the trial court declared a mistrial on that count. The jury found true four enhancements: a strike prior (§ 667, subds. (c) & (e)), a prior serious felony (*id.*, subd. (a)(1)), a prior prison term (§ 667.5, subd. (b)), and committing the crimes while on bail (§ 12022.1, subd. (b)).² The court sentenced defendant to 42 years and 4 months in prison on the verdicts and a pending domestic violence case.

On appeal, defendant contends there is insufficient evidence that he had care or custody of the children as required for the child endangerment counts. He further contends those counts must be reversed because the mothers of the children were accomplices to those counts and the trial court failed to instruct on accomplice testimony. Defendant contends the two driving counts (counts 2 and 3, vehicular manslaughter and DUI) must be reversed because the instructions allowed conviction on a legally insufficient theory. Finally, defendant contends there was no foundation for the accuracy of the data showing the SUV's speed at the time of the collision. As we explain, we disagree with all the claims and shall affirm the judgment.

FACTS

The Collision

In February 2016, Beshia Shoate, her three children, her sister Wyesia, and Wyesia's daughter were homeless and living in a shelter in Davis. Defendant was

¹ Further undesignated statutory references are to the Penal Code.

² Defendant pleaded no contest to driving on a suspended license. (Veh. Code, § 14601.1, subd. (a); count 8.)

Beshia's boyfriend and had lived with them before they were homeless. Defendant did not live in the shelter; he spent nights in the sisters' SUV with the dogs.

On the morning of February 24, the three adults took the children to school in West Sacramento and then went to their storage locker and smoked marijuana. Later, they picked the children up from school and went to the library. Defendant left the library with some friends, who were known to use methamphetamine. When defendant returned alone, he had red eyes and was acting "goofy," as he did when he had smoked marijuana.

Defendant drove the group back to Davis so they could check in at the shelter. When defendant left the freeway, he sped up and began swerving around cars. Wyesia's daughter, who was 13, asked him to slow down, but he just shrugged. On Second Street defendant came right up behind another driver (witness Tina Robinson), who was going 35 miles per hour in a 45-miles-per-hour zone. She increased her speed to the speed limit. Defendant backed off at first, but then Robinson heard him "floor it" and he passed her on the right (in the bike lane), narrowly missing a bicyclist (witness Blaise Camp). Robinson honked at defendant; she estimated his speed as 70 to 75 miles per hour. Camp, who races motorcycles, estimated defendant's speed as 70 miles per hour. Camp saw defendant move into the center turn lane, also known as the suicide lane, and pass another car. Another driver in the area estimated defendant's speed as 60 to 80 miles per hour.

Seconds later, there was an explosion. Defendant had crashed into the Honda driven by Jonasen. She was killed instantly; her spinal cord was severed. The force of the impact pushed the Honda off the road and left a considerable debris trail.

Bystanders helped Beshia, Wyesia, and their children out of the SUV. All were injured and taken to the hospital.

Evidence of Defendant's Intoxication

Corporal Michael Moore from the Davis Police Department responded to the scene. He noticed that defendant's eyes were red and watery; defendant was unsteady on his feet, swaying and unbalanced. He was disoriented, not following directions, and smelled of burnt marijuana. He had thick saliva at the corners of his mouth, or "cotton mouth." These are typical signs of marijuana use and defendant's symptoms were consistent with cannabis use. The SUV had the distinct odor of burnt marijuana and a pipe of the type used to smoke marijuana was found inside with partially burnt marijuana in its bowl.

Moore asked defendant if he was injured and defendant said yes, he thought his arm was broken. He told the paramedic he had smoked marijuana that day. At the hospital, his eyes were still red and he admitted to using methamphetamine a few days before and that he used marijuana daily, although he claimed a high tolerance. Moore checked defendant's eyes and his right eye was unable to maintain convergence; lack of convergence can be caused by marijuana intoxication. Moore also administered a modified Romberg test where defendant estimated 30 seconds to be 19, outside the normal variance. Moore arrested defendant based on the objective symptoms of intoxication consistent with marijuana and methamphetamine. He also prepared a warrant to test defendant's blood. At trial, Moore opined that defendant was impaired, primarily from marijuana.

The physician who saw defendant in the emergency room diagnosed him with poly substance abuse. His urine test was positive for marijuana, and his pulse was between 98 and 120, above normal. Defendant's blood samples tested positive for THC and methamphetamine. A heavy user may have marijuana in his system for weeks and both THC and methamphetamine can remain in the system after impairment. A criminalist testified that based on the test results, defendant had used methamphetamine in the past 48 hours.

Defendant was interviewed while at the hospital. He claimed he was driving at 45 miles per hour: “I drive real nice.” He said he smokes marijuana “all the time” and was not under the influence. He last smoked methamphetamine three or four days before; he had to smoke a lot of marijuana to get high.

Evidence of Defendant’s Speed

At trial, the People presented evidence of three different investigations to establish defendant’s speed at the time of the crash. Sergeant Rod Rifredi, the lead of the major accident investigation team, estimated the speed of the SUV at 75 to 85 miles per hour based on the damage to the vehicles, the intrusion to the Honda, the front-end damage to the SUV, how far apart the vehicles were post-collision, the grade of the roadway, and the size of the debris field. The speedometer of the SUV was stuck at 72 miles per hour after the crash.

Rifredi removed the restraint control module (RCM) from the SUV. The RCM provides data from sensors through the vehicle that notify the secondary restraint systems, airbags and seat belts, of a crash. When there is a crash, the seat belts pull the occupant into an upright position to prepare for deployment of the airbag. The RCM provides data about the timing of these actions and also some information about the speeds and characteristics of the vehicle. Rifredi also reached out to Chris Kauderer, a collision reconstructionist, as he needed a higher level of expertise and equipment.

Robert Andres worked for Continental Automotive Systems, and he was responsible for hiring and firing, as well as the technical day-to-day issues of the algorithm for vehicle safety issues. The algorithm is the software that interprets inputs from a crash to determine when the airbags should be deployed. He explained there is a speed sensor in each wheel and the vehicle’s speed is sent over a device called a controller area network (CAN bus) to the RCM and recorded. The CAN bus is a communication bus that broadcasts and receives information and shares information between the different electronic systems. Andres received the RCM from the SUV. He

extracted the information from the SUV's RCM and prepared a report. In response to defense objections to lack of foundation as to the accuracy of the vehicle speed from the RCM, Andres testified the RCM goes through testing, including software and crash testing, to ensure it records accurately. He explained that crash testing is a good check because the exact speed is known. Andres testified that to the best of his knowledge, based on his training and experience and the testing procedures of the RCM, the information about the SUV's speed (presented to the jury on a chart) was true and accurate.

Kauderer, the accident reconstructionist, received the RCM data from the SUV and used it to reconstruct the collision. The RCM data showed defendant was going 80 miles per hour one second before the collision. He was slowing, so Kauderer determined he was going about 76 or 77 miles per hour at impact. At five seconds before the collision, the SUV accelerator was at 74 percent of maximum. At three seconds out, there was no acceleration. One second before the collision, the SUV's brakes were applied, but not firmly enough to engage the antilock braking system.

Kauderer also performed an analysis using the EDCRASH software designed for a collision where other methodologies cannot be used. The EDCRASH analysis does not use RCM data; it is a completely separate analysis. The EDCRASH analysis uses three-dimensional laser scanners to measure the amount of intrusion on each vehicle. After inputting data about the vehicles' weights, position at impact, and position after the collision, the program uses an iterative process to determine speed. Averaging the results, Kauderer determined the SUV was travelling at about 79 miles per hour at impact and the Honda at 10 miles per hour. He also determined that the SUV was 380 to 493 feet away when the Honda entered the roadway. At 45 miles per hour, the SUV needed 189 feet to stop; at 55 miles per hour, it needed 256 feet. Kauderer concluded the SUV had ample time to stop without striking the Honda if it had been traveling at the speed limit.

The Defense

The defense conceded defendant was speeding, but contested whether he was intoxicated. The defense offered other explanations for defendant's condition after the crash, including the trauma of the crash, and that he had a lazy eye. The defense also focused on the varying accounts of events given by the occupants of the SUV and provided expert testimony that children were more susceptible to memory contamination.

DISCUSSION

I

Sufficiency of the Evidence of Care or Custody

Defendant contends the four counts of child endangerment must be reversed because there is insufficient evidence that he had "care or custody" of the children, as required by section 273a, subdivision (a).

A. The Law

Subdivision (a) of section 273a provides in part: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, . . . having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished"

The terms "care and custody" have "no special meaning" "beyond the plain meaning of the terms themselves. The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (*People v. Cochran* (1998) 62 Cal.App.4th 826, 832 [interpreting section 273ab].) "[T]he relevant question in a situation involving an individual who does not otherwise have a duty imposed by law or formalized agreement to care for a child (as in the case of parents or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities at all. 'Care,' as used in the statute, may be evidenced by something less than an express agreement to assume the duties of a

caregiver. That a person did undertake caregiving responsibilities may be shown by evidence of that person's conduct and the circumstances of the interaction between the defendant and the child; it need not be established by an affirmative expression of a willingness to do so." (*People v. Perez* (2008) 164 Cal.App.4th 1462, 1476 [interpreting section 273a, subd. (b)].)

In *People v. Morales* (2008) 168 Cal.App.4th 1075, defendant was driving with a teenage passenger when a police officer attempted to pull the car over. Defendant evaded the officer, sped through a stop sign, and collided with a telephone pole and a metal post. (*Id.* at p. 1078.) On appeal, defendant contended his conviction for child endangerment must be reversed because there was insufficient evidence he had "care or custody" of the teenager. (*Id.* at p. 1082.) In rejecting this contention, the appellate court reasoned: "[The teenager] was physically in the care of defendant who was transporting her when he endangered her life by his conduct. As a passenger in his speeding car, [the teenager] was deprived of her freedom to leave, and she had no control over the vehicle. The jury could reasonably conclude that in taking it upon himself to control [the teenager's] environment and safety, defendant undertook caregiving responsibilities or assumed custody over her while she was in his car." (*Id.* at pp. 1083-1084.)

B. Analysis

Following the reasoning of *Morales*, there is sufficient evidence that defendant had "care or custody" of the children as required by statute. The children were physically restrained in a moving car and in defendant's care when he drove them from West Sacramento to Davis; they could not leave the SUV. He alone had control of the SUV, and he put the children in danger by his illegal driving.

Defendant contends *Morales* is not controlling for two reasons. First, he contends its definition of "care and control" was implicitly overruled in *Winn v. Pioneer Medical Group* (2016) 63 Cal.4th 148 (*Winn*). At issue in *Winn* was whether the definition of neglect under the Elder Abuse and Dependent Adult Civil Protection Act (Act), which

requires a person have “the care or custody” of the elder or dependent adult, applied when a healthcare provider, providing outpatient care, fails to refer the elder adult to a specialist. Our Supreme Court concluded “the Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient.” (*Id.* at p. 152.) Focusing on examples of neglect in the statute--such as the failure to assist with personal hygiene or provide food, clothing, shelter or medical care, or to prevent malnutrition or dehydration--the high court found they contemplated “the existence of a robust caretaking or custodial relationship,” more than “casual or limited interactions.” (*Id.* at p. 158.)

The *Winn* court noted its conclusion was consistent with analogous provisions of other statutes using the phrase “having the care or custody” and pointed to section 368, the elder abuse statute, which in turn was derived from the felony child abuse (or endangerment) statute. (*Winn, supra*, 63 Cal.4th at pp. 161-162.) Defendant seizes upon this language and argues *Morales* is inconsistent with *Winn* because it did not require “a robust caretaking or custodial relationship.”

We are not persuaded that *Winn* overruled *Morales*. First, *Winn* did not mention *Morales*, or any of the cases defining “care or custody” for purposes of child endangerment. Second, the *Winn* court focused on the examples of neglect set forth in the statute at issue in *that* case; all the examples involved the failure to provide basic needs for the elder or dependent adult. (*Winn, supra*, 63 Cal.4th at pp. 157-158.) Drawing on these examples, the court concluded the appropriate standard for “care or custody” in the context of neglect under the Act is a “substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs.” (*Id.* at p. 152.)

Section 273a, by contrast, has a broader scope and covers not only failure to provide basic needs, but also “willfully caus[ing] or permit[ting] that child to be placed in

a situation where his or her person or health is endangered.” The context of the two cases is widely divergent; *Winn* does not affect *Morales*. *Winn* was concerned with heightened civil liability of a medical provider; we are concerned here with criminal liability for the well-being of children who were completely under defendant’s control when his driving placed them in grave danger.

Defendant next contends that *Morales* was wrongly decided and should not be followed. He faults *Morales* for requiring only physical custody without regard to the relationship between the defendant and the child. But a focus on defendant’s absolute control over the children’s environment appears appropriate in this case, where defendant put the children at risk by his driving and they could not escape the danger into which he was, literally, transporting them. One of the children asked him to slow down and he refused. Moreover, here the record established that defendant was not a stranger to the children and had more than “casual or limited interactions.” (*Winn, supra*, 63 Cal.4th at p. 158.) He had dated Beshia for two years and had lived with the group before they became homeless. During the interview, defendant repeatedly referred to the SUV’s occupants as “my family,” and “my kids.” In denying he was speeding, he explained: “I wouldn’t be high smoking weed with my kids in the car.” There was sufficient evidence for the jury to find defendant had the requisite “care or custody” of the children.

II

Failure to Instruct on Accomplice Testimony

Defendant contends the trial court erred in failing to instruct sua sponte on accomplice testimony. He argues trial witnesses Beshia and Wyesia were arguably accomplices to child endangerment because they allowed him to drive their children even though they knew of his drug use that day. He contends the error was prejudicial because no instruction told the jury to view the testimony of Beshia and Wyesia with caution and they provided the only direct evidence of defendant’s drug use near the time he drove.

A. *The Law*

“A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.” (§ 1111.)

“If there is evidence that a witness against the defendant is an accomplice, the trial court must give jury instructions defining ‘accomplice.’ [Citation.] It also must instruct that an accomplice’s incriminating testimony must be viewed with caution [citation] and must be corroborated [citation].” (*People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.)

“ ‘A trial court’s failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record.’ [Citation.] ‘Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.’ [Citation.] The evidence is ‘sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.’ [Citation.]” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 303.)

B. *Analysis*

We need not determine if accomplice instructions should have been given here, because any error in their omission was clearly harmless. There was ample evidence to corroborate Beshia’s and Wyesia’s testimony about defendant’s drug use that day. Moore concluded defendant was under the influence based on his physical condition and field sobriety tests performed at the hospital. A bystander reported that he had slurred speech and appeared drunk. Two of the children testified he appeared “more serious” or

“tired with red eyes” when he returned to the library. The drug tests were positive for both marijuana and methamphetamine, and multiple experts testified tolerance does not correlate with impairment. Marijuana and a pipe used to smoke marijuana with partially burnt marijuana in the bowl were found in the SUV.

Defendant contends the concern is not the lack of corroboration as much as the lack of direction to the jury to view the women’s testimony with caution.³ He stresses the importance of the omitted instruction is that it focuses the jury on particular testimony as opposed to the general instructions on witness credibility.

The People argue “the jury had all it needed to doubt Beshia’s and Wyesia’s testimony.” Both Beshia and Wyesia were cross-examined with previous inconsistent statements. In closing, the defendant argued Beshia had changed her story four times. The jury was instructed that in evaluating a witness’s testimony, it should consider the witness’s bias or prejudice, whether the witness made inconsistent statements in the past, and whether other evidence proved or disproved a fact about which the witness testified. The jury would have used these witness credibility instructions in evaluating the truth of the women’s testimony. (*People v. Gonzales and Soliz, supra*, 52 Cal.4th at p. 304.)

Given the substantial evidence of defendant’s guilt *without* considering the testimony of Beshia and Wyesia, it is not reasonably probable that the jury would have reached a result more favorable to defendant had it been instructed as he claims it should have been. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

³ The concern with accomplice testimony, in part, is “because accomplices have a special motive to minimize their own roles or to help convict the defendant in the hopes of leniency in their own sentencing.” (*People v. Mackey* (2015) 233 Cal.App.4th 32, 123.) Here, the prosecution had the opposite concern about Beshia, that she was minimizing defendant’s behavior as she had done in his domestic violence case.

III

Instructional Error: Conviction on Insufficient Theory

Defendant contends his convictions on counts two and three (manslaughter and DUI) must be reversed because the jury was given a legally insufficient theory for conviction. He contends that under the instructions given, the jury could have used his passing Robinson (to the right) in the bike lane as a basis for convicting on counts two and three even though that conduct did not *cause* the collision with Jonasen. We construe this contention as a claim of instructional error--the giving of an instruction unsupported by the evidence. We find no prejudicial error.

A. Background

Defendant was charged in count one with implied malice murder. The jury was instructed that to find guilt it had to find, among other things, that defendant's actions were dangerous to human life and that he knew it, and that he acted with conscious disregard of human life. For count two, gross vehicular manslaughter, the jury was instructed it had to find that defendant committed a misdemeanor, infraction, or otherwise lawful act that might cause death with gross negligence, and that grossly negligent conduct caused the death of another. For count three, DUI causing injury, the instruction required that defendant commit an illegal act or fail to perform a legal duty and such illegal act or failure to perform a legal duty caused bodily injury to another.

As such, the instructions required the jury to find causation as to counts two and three--that defendant's infractions *caused* the death and injury--but not as to count one.

The jury was instructed on various driving infractions under the Vehicle Code. The trial court instructed on violation of the maximum speed law and violation of the basic speed law (driving faster than reasonable for the conditions), as well as six additional infractions, set forth in Instructions A-F: failure to maintain a lane, unsafe lane change (moving left or right), illegal passing to left, unsafe lane change (failure to pass left), following too closely, and illegal passing within the bicycle lane.

The jury could consider and apply these infractions for different purposes. It could rely on any of the eight infractions it found true to satisfy the elements of implied malice murder: that defendant's conduct was dangerous to human life and he knew it, and that he acted with conscious disregard. However, because both counts two and three required a causal connection between the infraction and the death or injury, the infractions that the jury could find to support those counts were limited to those infractions that occurred *just before the collision*. Accordingly, the trial court instructed the jury that it could rely only on the two speeding infractions, failure to maintain lane, unsafe lane change (moving left or right), and illegal passing to the left to find defendant guilty of counts two and three. Instructions D-F, unsafe lane change (failure to pass left), following too closely, and illegal passing within the bike lane, told the jury these infractions could be used only on the murder count, not on counts two or three. The trial court emphasized this limitation by rereading it to the jury just before closing arguments.

B. *Analysis*

Defendant's contention centers on Instruction B, unsafe lane change (left or right), which quotes from Vehicle Code section 22107: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement." Defendant argues the jury could have used defendant's movement to the right, when he entered the bike lane to pass Robinson and came close to striking bicyclist Camp, as the infraction necessary for counts two and three. He contends this conduct is legally insufficient because it occurred well before the collision and there was no causal connection between this conduct and the collision.

Although defendant frames his contention as one of *legal* insufficiency, his actual argument is that here the *facts* do not support the instruction. An unsafe lane change, moving either left or right, *could* be part of the basis for finding vehicular manslaughter

or DUI, but moving to the *right* could not be used as a basis for such findings *in this case* because there was no evidence that movement to the *right* (into the bicycle lane) caused Jonassen's death. The evidence showed that defendant's move to the *left*, into the suicide lane, immediately preceded the accident. In effect, defendant is arguing there was insufficient evidence that his movement to the *right* in violation of Vehicle Code section 22107 could serve as a basis for counts two or three because the necessary causal connection was missing.

“When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner.” (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) “It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved of on another point by *People v. Reyes* (1998) 19 Cal.4th 743, 756.) Viewing the instructions as a whole, we determine that here there is no reasonable likelihood the jury applied Instruction B to find defendant guilty of counts two and three based on his movement to the right and into the bike lane.

The only evidence that defendant made an unsafe lane change to the right was when he crossed into the bike lane. The jury was explicitly--and repeatedly--told that this conduct could not be used to find guilt on counts two or three. Further, the jury was instructed that the grossly negligent conduct or illegal act had to cause the death or bodily injury. We presume the jury followed the instructions. (*People v. Edwards* (2013) 57 Cal.4th 658, 764.)

Defendant argues the jury could reasonably have followed the language of Instruction B and used his movement to the right into the bike lane to find gross negligence. We disagree. First, the jury would have had to disregard the more explicit

instructions that the movement into the bike lane could not be so used. Second, the jury would have had to ignore the instructions that required a causal connection between the conduct and the collision and resulting injuries. “An appellate court necessarily operates on the assumption that the jury has acted reasonably, unless the record indicates otherwise.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1127.) Nothing in the record supports the view that the jury acted so unreasonably as to rely on Instruction B while disregarding more explicit instructions *not* to consider driving into the bike lane in support of these counts and to consider only infractions that *caused the collision*.

Further, as defendant points out, the jury was instructed there could be more than one cause of death and in determining gross negligence it was to consider the way defendant drove and other relevant aspects of his conduct. Here, overwhelming evidence showed that defendant was driving about 30 miles per hour over the posted speed. In closing, defense counsel conceded defendant was speeding. Counsel conceded the jury could consider defendant’s speeding as causing the death, but argued the other infractions occurred earlier or were not proven. The People argued the defense conceded speeding and only one infraction was needed. On this record it is inconceivable that the jury ignored the abundant evidence of speeding and based its verdicts on counts two and three on defendant’s incursion into the bike lane despite explicit instructions not to do so.

IV

Foundation for Expert Testimony

Defendant contends the trial court erred in overruling his foundation objection to the accuracy of the data from the RCM. He asserts Andres’ testimony was insufficient to provide a foundation because Andres was familiar only with the restraint systems and not the throttle or braking systems. Defendant contends the crash test could not be used to establish reliability of the data because Andres did not perform the testing. He further contends Andres provided no evidence as to the reliability of the fault codes.

Defendant contends the admission of this data was prejudicial. While the defense conceded defendant was speeding in the face of overwhelming evidence thereof, defendant urges that speeding alone does not establish gross negligence.⁴ The RCM data showed that defendant was not only speeding but failed to brake until literally the last second. Defendant argues this evidence from the RCM data gave a “scientific” imprint to evidence of defendant’s negligence.

A. Background

Andres testified he worked on the algorithm for the RCM that interpreted data from sensors throughout the vehicle to determine when to deploy airbags and adjust seatbelt tension. He obtained the RCM from the SUV. To download the information from the RCM he used a piece of equipment called a vehicle load box. He checked the equipment first with an exemplar RCM to determine there were no faults. The information from the RCM comes in hexadecimal format interpreted by software. The readout from the software was presented in People’s exhibit 216. When Andres began to testify about a chart that showed information from the SUV for five seconds before and after the collision, he noted some of the information from the RCM, about the throttle and the accelerator, was not used in his algorithm and he was not familiar with it. The trial court sustained the defense foundation objection. Vehicle speed data was used in his

⁴ Defendant cites to *People v. Bennett* (1991) 54 Cal.3d 1032, 1039, which held the instruction for gross vehicular manslaughter while intoxicated should read in part: “ ‘The mere fact that a defendant drives a motor vehicle while under the influence of alcohol and violates a traffic law is insufficient in itself to constitute gross negligence. You must determine gross negligence from the level of the defendant’s intoxication, the manner of driving, or other relevant aspects of the defendant’s conduct resulting in the fatal accident.’ ” But *Bennett* also recognized the degree of speeding affects the degree of negligence. “ ‘[O]ne who exceeds the speed limit by 50 miles per hour exhibits greater negligence than one who exceeds the speed limit by 5 miles per hour.’ ” (*Id.* at p. 1037, quoting *People v. Von Staden* (1987) 195 Cal.App.3d 1423, 1428.)

algorithm but he was unsure which method was used to measure speed on the SUV. The court again sustained defense foundation objections.

Outside the presence of the jury, the trial court questioned how the data could be said to be true and accurate when Andres did not know much about it. The People responded Andres knew of its accuracy because he had used such data on other occasions and it had been tested in crash tests. The court allowed the People to lay that foundation. Andres testified the RCM goes through rigorous software testing of every function of the module. Also, many crash tests are performed and the data compared to the known speed of the crash test. Based on his experience, training, and knowledge of the testing procedures, Andres stated the information from the RCM listed on the chart was true and accurate to the best of his knowledge. The court overruled the defense foundation objection. The download from the RCM included the full history of fault codes. A review of that information revealed nothing to indicate any of the sensors were compromised. There were no active faults at the time of the collision. The court overruled a foundation objection to testimony about the fault codes.

B. *Analysis*

Trial courts have “a substantial ‘gatekeeping’ responsibility” to determine whether the basis of the expert’s opinion meets a threshold of reliability. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 769.) We review a trial court’s ruling excluding or admitting expert testimony for abuse of discretion. (*Id.* at p. 773.) “A trial court enjoys broad discretion in ruling on foundational matters on which expert testimony is to be based.” (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.)

The RCM records data in real time from various sensors throughout the vehicle. Data recorded in real time by computer systems does not require the type of detailed foundation that defendant claims is necessary. “It is settled computer systems that automatically record data in real time, especially on government-maintained computers,

are presumed to be accurate. Thus, a witness with the general knowledge of an automated system may testify to his or her use of the system and that he or she has downloaded the computer information to produce the recording. No elaborate showing of the accuracy of the recorded data is required. Courts in California have not required ‘testimony regarding the “ ‘acceptability, accuracy, maintenance, and reliability of . . . computer hardware and software’ ” in similar situations. [Citations.]’” (*People v. Dawkins* (2014) 230 Cal.App.4th 991, 1003.) “The rationale is that while mistakes may occur, such matters may be developed on cross-examination and should not affect the admissibility of the printout or recording of the data itself.” (*Ibid.*)

In *People v. Rodriguez* (2017) 16 Cal.App.5th 355, an officer’s testimony, based on his training, about how the GPS device on defendant’s ankle bracelet worked was sufficient to provide the requisite foundation for admission of the GPS report. The appellate court rejected the argument that a computer expert was required to explain the operation of the hardware and software, finding “a person who generally understands the system’s operation and possesses sufficient knowledge and skill to properly use the system and explain the resultant data, even if unable to perform every task from initial design and programming to final printout,” is sufficient. (*Id.* at p. 376.)

Here, Andres understood the operation of the RCM and could explain the resultant data. He was very knowledgeable about the RCM data relating to the passive restraint systems as he had designed parts of the algorithm that deploys the safety devices. As to other data on the RCM relating to vehicle speed, throttle position, and braking, he testified crash tests were used to design and test the reliability of the RCMs. He also testified about the “rigorous software testing” on every function of the module to ensure each functioned correctly.

Defendant argues Andres could not rely on testing that he had not personally performed, citing to *People v. Lucas* (2014) 60 Cal.4th 153, disapproved on other grounds in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19. In *Lucas*,

defendant offered a research methodology expert (Dr. Saks) to discuss proficiency studies of handwriting comparisons and thus counter the People's handwriting expert. Our Supreme Court found no abuse of discretion in excluding his testimony and the proficiency studies because they lacked the necessary foundation. (*Id.* at pp. 226-227.) "The trial court refused to hear Dr. Saks's testimony because he was neither a practitioner nor a researcher of handwriting comparison. Instead, Dr. Saks was merely prepared to discuss several proficiency studies that he had read concerning handwriting comparison. The court expressed its concern that, because Dr. Saks was not a handwriting expert, the studies were inadmissible hearsay without a showing that they were the kind of studies that handwriting experts would reasonably rely upon. The court also observed that Dr. Saks had not personally performed the studies on which he was relying, and, consequently, he could not adequately account for the base of information underlying his opinion. Defendant misinterprets this ruling to state that only the direct practitioner of a technique can testify regarding the reliability of that technique. On the contrary, the trial court merely held that Dr. Saks's lack of personal experience with both handwriting comparison and studies measuring the reliability of that analysis precluded him from having a sufficient basis for him to opine on the accuracy or reliability of that analysis generally." (*Ibid.*)

Defendant misinterprets *Lucas* in the same manner the defendant in *Lucas* misinterpreted the trial court's ruling. The problem in *Lucas* was that the expert lacked personal *experience* with the studies, not that the expert had failed to personally *perform* them. Here, Andres had the requisite experience. He testified the crash studies were used to develop the RCM system. He had seen hundreds of cases and worked with these modules "all the time." Thus, unlike Dr. Saks in *Lucas*, Andres was familiar with and had personal experience with the crash studies.

Finally, Defendant contends there was no foundation for Andres' testimony about the fault codes. Andres explained the RCM constantly monitors the system to make sure

it is working properly. If a sensor is disconnected the system would store a fault code and provide a warning on the vehicle's dashboard to indicate the system is compromised. His review of the fault code information indicated no compromise in any of the sensors. There were no active faults at the time of the collision. Andres understood and explained the fault codes and how they worked. Under the rule for foundation of information recorded on computer systems set forth in *People v. Dawkins, supra*, 230 Cal.App.4th at page 1003, this was sufficient foundation.

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Mauro, J.